IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23809-1-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
ALVIN CARL WRIGHT,	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

SCHULTHEIS, A.C.J. —Alvin Carl Wright was convicted of one count of unlawful possession of a firearm. The State appeals his exceptional sentence. We conclude that the nature of the offending conduct provides a substantial and compelling reason articulated by the sentencing court to depart from the guidelines. The trial judge would have ordered the same sentence on the strength of that valid factor alone. We therefore affirm.

FACTS

Mr. Wright and his wife, Bonnie Wright, were in the midst of divorce proceedings when he argued with her on February 10, 2003. Mr. Wright tracked her down and told her

she needed to go to his attorney's office and sign papers; she refused. He left, but later he returned. Mrs. Wright became anxious and afraid, and she called the police. She told police that Mr. Wright's brother had stored some guns in Mr. Wright's basement closet following a flood at the brother's home. Because a previous criminal conviction makes Mr. Wright ineligible to possess firearms, police obtained a search warrant and seized five guns from Mr. Wright's residence that belonged to his brother. Mr. Wright was charged with one count of felony harassment and five counts of first degree unlawful possession of a firearm. After numerous pretrial motions, Mr. Wright pleaded guilty to one count of misdemeanor harassment and one count of first degree unlawful possession of a firearm.

The first degree unlawful firearm possession charge carried a standard range of 21 to 27 months. Mr. Wright sought an exceptional mitigated sentence. The State opposed the request. The sentencing judge ordered an exceptional sentence on the felony firearm possession charge of 365 days' total confinement with work release, to run concurrently with the misdemeanor harassment sentence. Findings of fact and conclusions of law were prepared by defense counsel and presented three months later. The State appeals the exceptional sentence.

DISCUSSION

A trial court must generally impose a sentence within the standard range. *See* RCW 9.94A.505(2)(a)(i). "The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the

purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The Sentencing Reform Act of 1981 (SRA) lists eight nonexclusive factors that the court may consider when imposing an exceptional sentence.[1] RCW 9.94A.535(1). These statutory factors "are illustrative only and are not intended to be exclusive reasons for exceptional sentences." Former RCW 9.94A.535 (2002).

Review of a sentence outside the standard range requires a three-part analysis set forth in RCW 9.94A.585(4). *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002). We first decide, under the clearly erroneous standard, whether the record supported the reasons given by the sentencing court for imposing the exceptional sentence. Second, we determine if, as a matter of law, the sentencing court's reasons justify the imposition of an exceptional sentence. Third, we determine whether a sentence below the standard range is clearly too lenient under the abuse of discretion standard. *Id.* at 405-06; RCW 9.94A.585(4). The State's argument embraces only the second part of this analysis.

[1] These factors include: (1) the victim initiated, willingly participated in, or provoked the incident; (2) the defendant made a good faith effort, before his acts were detected, to compensate the victim; (3) the defendant committed the crime under duress, coercion, threat, or compulsion; (4) the defendant, in the absence of predisposition, was induced by others to participate in the crime; (5) the defendant's capacity to appreciate the wrongfulness of his or her conduct was significantly impaired; (6) the offense was principally accomplished by another person; (7) the operation of the multiple offense policy results in a sentence that is clearly excessive; and (8) the offense was a response to a pattern of physical or sexual abuse by the victim. RCW 9.94A.535(1)(a)-(h).

The question before us is whether the sentencing court's factual findings constitute substantial and compelling reasons for departing from the standard range as a matter of law. RCW 9.94A.585(4). When, as here, the trial court does not identify one of the statutorily defined reasons for downward departure listed in RCW 9.94A.535(1), we employ a two-part test to determine whether the reasons justify an exceptional sentence. *State v. Alexander*, 125 Wn.2d 717, 724, 888 P.2d 1169 (1995).

> "'First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted [mitigating] factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'"

Id. at 725 (quoting *State v. Smith*, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993) (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991))).

The answer to the first step of the test—deciding whether the legislature considered a particular factor in establishing the standard sentence range—depends on two things: (a) whether the factor is an element of the crime for which the defendant is to be sentenced and (b) whether the factor is considered in the computation of the defendant's standard sentence range in RCW 9.94A.530(1). *Id.* at 726.

The trial court made a number of written findings of fact to support its exceptional sentence. The findings that the parties address in argument can be distilled to four general reasons: (1) The nature of the offending conduct—Mr. Wright's possession of the guns was limited to allowing the guns to be

stored in the back of a little-used closet in his residence where they were not easily accessible;[2] (2) Mrs. Wright was an instigator and participant and had knowledge of the offenses;[3] (3) Mrs. Wright requested a lower sentence and asked that the harassment prosecution be discontinued;[4] and (4) Mr. Wright is addressing "any psychological problem and mental health condition that he has pertaining to" the charged offenses (Clerk's Papers (CP) at 116, Finding XXXII).

Nature of the Offending Conduct. The crime in this case is first degree unlawful

---

[2] This reason is based on a number of findings of fact: Finding V (Mr. Wright's possession was not for any purpose related to its use); XI (Mr. Wright's brother brought the guns after a flood and where they were placed far to the rear of a basement closet); XII (Mrs. Wright had not seen the guns for 8 months and did not recall her husband bringing them out); XIII (the guns were merely stored in the residence and were detected by police when Mrs. Wright told police of their presence three or four days after a domestic dispute); and XXIV (the possession did not involve malice). There are also conclusions of law erroneously denominated as findings that relate to this reason: Finding XX (the circumstances involving Mr. Wright's unlawful firearm possession differed from those in which unlawful possessors attempted to hide the guns); XXI (the mitigating circumstances of Mr. Wright's possession were materially and substantially different from other gun possessors); and XXXIII (the offense is less serious than similar crimes of the same nature).

[3] This reason is based on Finding X (Mrs. Wright knew the guns were in the closet six months before the parties' domestic dispute); XIV (Mrs. Wright did not report the guns when she first knew about them); XV (Mrs. Wright was in a verbal confrontation with Mr. Wright); and XXIII (although Mrs. Wright and others knew about the guns, she (and others) did not come forth and turn in the guns).

[4] The court's reason is based on Findings I-III and XXXI (Mrs. Wright wrote letters of support and requested an exceptional sentence).

possession of a firearm under former RCW 9.41.040(1)(a) (1997).[5] While the statute obviously encompasses all degrees of possession of firearms, "we do not generally consider [the legislature] to have contemplated the particular features of crimes which may occur at the undefined end of the range." *Alexander*, 125 Wn.2d at 726 & n.17 ("'While the Legislature might have reasoned that victims less than 14 years old were more vulnerable in general than those 14 or older, it could not have considered the particular vulnerabilities of specific individuals [in the 0 to 14 range]'" (quoting *State v. Fisher*, 108 Wn.2d 419, 424, 739 P.2d 683 (1987)) and (citing *State v. Tinkham*, 74 Wn. App. 102, 871 P.2d 1127 (1994) ("Legislature's treatment of all children less than 12 years of age as the same for purposes of the first degree rape of a child statute does not reflect its consideration of specific ages within the 0 to 12 range"))). *Alexander* involved a .00003 kilogram of cocaine. *Alexander*, 125 Wn.2d at 727. The court held that even though the statute covered possessions of 0 to 2 kilograms, the small amount involved in the defendant's crime was not an element of the crime defined by the statute. *Id*.

Here, the limited nature of the possession is not reflected in the elements or considered in the computation of the standard sentence range. The first part of the test is

[5] Former RCW 9.41.040(1)(a), in effect at the time the crime was committed, provided, "A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter."

satisfied.

We now address the second part of the test, in which we consider whether the factor distinguishes the crime from other crimes of the same statutory class. The possession of the firearm that is stored in a difficult-to-reach area is a factor found in former RCW 9.41.040(1)(a) to the extent that it is a violation of the statute, but it is not inherent in all classes of unlawful firearm possession crimes. *See* former RCW 9.41.040(2) (1997) (distinguishing first and second degree unlawful possession of a firearm by the status of the possessor rather than the nature of the possession). A limited possession distinguishes Mr. Wright's crime from others in the same category, and it meets the second requirement.

The State objects to Findings XVII and XVIII upon which the reason is based because these findings refer to the plea negotiations, which are irrelevant and a violation of ER 410.[6] ER 410 generally makes plea offers inadmissible "against the person who made the plea or offer." Because ER 410 protects the defendant, a defendant can waive its protection. *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995); *see* 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice §

[6] Finding XVII states, "The Court is also aware that this was a compromised plea by the parties, and although Alvin Carl Wright entered a plea of guilty, many factors are in dispute and legal questions were compromised in arriving at this resolution by plea." CP at 114. Finding VIII states, "The Court finds that the parties, through their attorneys, discussed the resolution with the Court prior to the on-record plea, and there was a discussion concerning downward departure, sentence and work release as potential options in a sentence." CP at 114.

410.1, at 70 (4th ed. 1999) ("evidence barred by Rule 410 would not be admissible to impeach the defendant's testimony at trial").

Mrs. Wright's Role. RCW 9.94A.535(1)(a) provides for a mitigating factor when "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." Mr. Wright concedes that this factor does not apply to the firearm charge because Mrs. Wright was not a victim to that crime. Resp't's Br. at 9-10. But he argues that it applies to the harassment charge. The State argues that it does not apply to the harassment charge because it is a misdemeanor under RCW 9A.46.020(2)(a) and the SRA does not apply to misdemeanors. The State is correct. The SRA applies only to the sentencing of felony offenders. *State v. Williams*, 97 Wn. App. 257, 263, 983 P.2d 687 (1999) (citing RCW 9.94A.010); *State v. Marks*, 95 Wn. App. 537, 539, 977 P.2d 606 (1999). This reason cannot support the mitigated sentence.

Mrs. Wright's Wishes. Mrs. Wright's preference that the harassment prosecution cease and that Mr. Wright receive a lesser sentence on the unlawful firearm possession charge is not a substantial and compelling reason to depart from the standard range. Again, her status as a victim to the harassment charge is not relevant to the sentencing on the unlawful firearm possession.

Mr. Wright's Evolving Mental State. The trial court found that Mr. Wright "is addressing any psychological problem and mental health condition that he has pertaining to these charges." CP at 116, Finding XXXII.

Mr. Wright contends that although it does not rise to the level of the statutory mental capacity mitigation factor, *see* RCW 9.94A.535(1)(e), this finding can be analyzed under the two-part *Alexander* test. He asserts that contrary to the State's argument that this is a random finding, it reflects the opinion given by Mr. Wright's psychologist at the time of sentencing that Mr. Wright suffered remorse, guilt, and despair over the situation, which he never attempted to blame on anyone else. The psychologist actually stated that Mr. Wright was referred by his divorce attorney due to his remorse, guilt, and despair. It is unclear who reported Mr. Wright's condition—Mr. Wright or his attorney. The psychologist went on to provide his opinion concerning Mr. Wright's character.

Mitigating factors must relate to the crime and cannot be related to facts personal to a particular defendant. *State v. Law*, 154 Wn.2d 85, 103, 97, 110 P.3d 717 (2005). The finding regarding Mr. Wright's evolving mental state is not a valid mitigating factor because it involves personal facts regarding Mr. Wright's postcrime status that only alludes to a minor connection to the crime. This reason is neither substantial nor compelling.

Personal Characteristics. The SRA applies "equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340; *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997). A central purpose of the SRA is "meting out the appropriate punishment for a particular crime, rather than tailoring the sentence to a particular individual." *State v. McClarney*, 107 Wn.

App. 256, 263, 26 P.3d 1013 (2001). Therefore, the sentencing court may not consider a defendant's personal circumstances. *Law*, 154 Wn.2d at 97.

The State argues that, "[s]everal of the findings reflect personal characteristics of the defendant" that may not be considered. Appellant's Br. at 10. The State correctly points out that a number of the findings address personal characteristics or factors. *E.g.*, Finding I (court's consideration of letters of support); II (Mrs. Wright's request for a lower sentence, the absence of any gun threat to her during her marriage to Mr. Wright, and Mrs. Wright's refusal to testify against him); III (same); IV (Mr. Wright's family support); XXV (Mr. Wright's lawful postoffense conduct); XXVI (Mr. Wright's current responsiveness to legal obligations); XXIX (Mr. Wright's age); XXX (Mr. Wright's effort and desire to reform his criminal behavior); XXXI (Mrs. Wright's request for a lower sentence); and XXXII (Mr. Wright's efforts to address his psychological problems). However, the findings that sustain the court's exceptional sentence do not contain personal characteristics. *See* Findings V, XI, XII, XIII, XXI, and XXIV (described in note 2, *infra*).

A sentence can be upheld if there is at least one valid factor. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). The reviewing court can consider the trial court's oral decision to supplement and interpret its findings. *State v. Wilson*, 96 Wn. App. 382, 389-91, 980 P.2d 244 (1999); *Johnson v. Dep't of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993). In its oral decision, the court discounted as anecdotal the personal information he received from Mr. Wright's

supporters and remarked, "What I am here to do . . . is decide whether this man's crime that he has pled to rises to the level of a crime that should fit within a standard range or not." Report of Proceedings (Jan. 12, 2005) at 69. The sentencing court clearly considered crime-related factors over personal factors.

Weight on Invalid Factors. The State argues that remand is required here due to the significance the court afforded invalid factors. In *State v. Henshaw*, 62 Wn. App. 135, 140, 813 P.2d 146 (1991), Division One of this court held that remand was necessary when the sentencing court placed considerable weight on one invalid aggravating factor. In *Henshaw*, the other aggravating factor to support the exceptional sentence was valid and not challenged on appeal, but the court could not determine whether the sentencing court would have imposed the same exceptional sentence on the basis of the remaining valid factor alone.

In *Gaines*, the Washington Supreme Court remanded an exceptional sentence after it found that the trial court relied on an invalid mitigating factor and mentioned a second mitigating factor only incidentally. *Gaines*, 122 Wn.2d at 512-13 (citing *Henshaw*, 62 Wn. App. at 140).

Here, based on its oral decision, the sentencing court had two major reasons for the mitigated sentence. The first reason concerns the nature of the offense, which is a valid mitigating factor. The second reason involved Mrs. Wright's involvement, which is not a valid factor. The written conclusions of

law set forth only the second reason. However, there are conclusions of law erroneously denominated as findings of fact to support the valid reason. *See* Finding XX (the case is different in time and content from others attempting to hide guns); XXI (the mitigating circumstances of Mr. Wright's possession were materially and substantially different from other gun possessors); and XXXIII (the offense is less serious than similar crimes of the same nature). Although these conclusions of law are incorrectly denominated, we give them proper legal effect and treat them as conclusions of law. *State v. Hutsell*, 120 Wn.2d 913, 918-19, 845 P.2d 1325 (1993) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987)). Moreover, the sentencing court engaged in a more thorough oral analysis when it addressed the valid factor.

The written findings of fact and conclusions of law as prepared by counsel included extraneous information. The sentencing judge acknowledged that at presentment and attributed it to his inarticulate oral ruling. Remand is not necessary if we are confident the court would impose the same sentence upon considering only valid factors. *State v. Ross*, 71 Wn. App. 556, 567, 861 P.2d 473, 883 P.2d 329 (1993) (citing *State v. Pryor*, 115 Wn.2d 445, 456, 799 P.2d 244 (1990)). There is no doubt that the trial court intended to grant this exceptional sentence for the valid reason stated.

Materials Considered. Former RCW 9.94A.530(2) (Laws of 2001, ch. 10, § 6)

relevantly provides:

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in [former] RCW 9.94A.535(2) (d), (e), (g), and (h).

The State contends that the sentencing court improperly relied on nontrial materials. The finding to which the State objects states:

> The Court has considered the sentencing memorandums and Motion for Downward Departure, including the temporal sequence of the facts in this case leading to these charges. These facts and times are set forth in the Motion to Suppress Evidence, and Motion for Downward Departure.

CP at 113-14, Finding XVI.

The State asserts only that the sentencing court's reliance on the suppression hearing memorandum violates the statute. Assuming without deciding that the trial court considered more materials than is permissible under the statute, all of the findings of fact can be found in or inferred from the declaration and letter by Bonnie Wright. Therefore, the finding to which the State objects is superfluous, and any error would be harmless. *State v. Banks*, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003).

CONCLUSION

The limited nature of the offending conduct in Mr. Wright's possession is a valid mitigating factor upon which to base a mitigated sentence. Although the trial court considered nonvalid factors, because the sentencing court's intention to order an exceptional sentence on the valid factor is clear, remand is not necessary. We therefore affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Schultheis, A.C.J.

WE CONCUR:

_____ _____
Kato, J. Thompson, J. Pro Tem.